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to the use of this remedy, that the party might possibly obtain another by commencing a new litigation in another tribunal.

We are of opinion, therefore, that the circuit court had authority to issue the writ of mandamus in this case.

It is no reason for setting it aside, that a previous alternative writ had not issued. The notices served on the commissioners gave them every opportunity of defense that could have been obtained by an alternative mandamus. There was no dispute about facts which could affect the decision. The Court gave them an opportunity to comply with the demand of the plaintiffs; their excuse for not doing so was, palpably, "a mere colorable adjournment or procrastination of the performances of the act for the purpose of delay." It is equivalent to a refusal. Having refused to perform the duty which the law imposed upon them on the proper day, without even the pretence of a reason for such conduct, the peremptory mandamus was very properly awarded, commanding the duty to be performed "*forthwith*."

The judgment of the circuit court is, therefore, affirmed with costs.

*In the District Court of the United States for the Wisconsin
District.*

GREENE C. BRONSON AND OTHERS vs. THE LA CROSSE AND MILWAUKEE
RAILROAD COMPANY. IN EQUITY.

1. By the act of Congress and the rules of practice of the circuit courts of the United States, in equity, a party has a right to have witnesses within the jurisdiction of the court examined in open court; or he may have a commission issued with written interrogatories annexed for the examination of such witnesses, unless the interrogatories be waived by the opposite party, when the examination is had as a deposition, but the commission may be dispensed with by consent.
2. In States where there is no law regulating the taking of depositions of witnesses within the jurisdiction, the act of 1802 does not apply; and one party cannot require the other party to attend the taking of the depositions of such witnesses before a master unless in cases specially provided for in the act of September, 1789.

The opinion of the Court was delivered by

MILLER, J.—At the instance of complainants' counsel, a master of this court notified defendants' counsel that the depositions of certain witnesses who were within the jurisdiction would be taken before him on a day named, to be read in evidence at the hearing of this cause. The defendants' counsel refused to attend; and he has moved the court to suppress the depositions, on the ground that they were taken without authority.

By section 30 of the act to organize the judicial courts of the United States, 1 Statutes at Large, 88,—“The mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction as of actions at common law.” And by section 25 of the act of April 29, 1802, 2 Statutes at Large, 166,—“In all suits in equity it shall be in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by depositions, which depositions shall be taken in conformity to the regulations prescribed by law for the courts of the highest original jurisdiction in equity in cases of a similar nature, in that State in which the Court of the United States may be holden; *Provided*, however, that nothing herein contained shall extend to the circuit courts which may be holden in those States in which testimony in chancery is not taken by depositions.” The Constitution of the State of Wisconsin directs that, “the testimony in causes in equity shall be taken in like manner as in cases at law, and the office of master in chancery is abolished.”

In *Cann vs. Penn*, 5 Wheaton, 424, decided in the year 1820, Marshall, C. J., remarks,—“The judiciary act directs that the mode of proof shall be by oral testimony, and that witnesses shall be examined in open court.” “The act of 1802 leaves it to the discretion of the court in those States where testimony in chancery is taken by depositions, to order, on the request of either party, the testimony of the witnesses to be taken by depositions.” It will be observed that the act of 1802 does not apply to this court, as by

the constitution of the State, testimony of witnesses is to be taken in court, in the same manner in cases in equity as at law.

In pursuance of the act of May 8, 1792, section 2, 1 Statutes at Large, 276, which empowered the Supreme Court of the United States to regulate proceedings in equity, and from time to time by rule to prescribe regulations to any circuit or district court concerning the same, the Supreme Court, at the term of February, 1822, adopted rules of practice for the courts of equity of the United States, which are to be found in 7 Wheaton's Reports. By these rules, "testimony may be taken according to the acts of Congress or under a commission. And all testimony taken under a commission shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith." At the term of the Supreme Court of the United States of January, 1842, a new set of rules of practice were adopted for the courts in equity, to take effect on the first day of August of that year. By rule 67, after the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term jointly by both parties, or severally by either party upon interrogatories—the commissioners to be named by the court or the judge, or by an amendment, by the clerk. If the parties so agree the testimony may be taken upon oral interrogatories by the parties or their agents without filing any written interrogatories. This rule follows the previous rule, in requiring a commission with written interrogatories, unless they be waived by the parties. By rule 68, testimony may also be taken by depositions according to the acts of Congress. But in such case, if no notice be given to the adverse party of the time and place of taking the depositions, he shall be entitled to a cross-examination. The first sentence of this rule in effect recognizes the acts of Congress above cited, and also the whole of section 30 of the act to establish the judicial courts of the United States, approved September 24, 1789. The act of 1802 not being applicable to this district, the only act binding on this court is the act of 1789.

By section 6 of an act approved August 23, 1842, 5 Statutes at Large, 518, the Supreme Court is invested with full power and

authority from time to time to prescribe, regulate, and alter the forms and modes of taking and obtaining evidence. This act was passed and went into force subsequently to the present rules, and the Supreme Court have not exercised the authority conferred by changing them in this particular.

From this investigation of the subject I have come to the conclusion that, according to the rules of practice, the only method of taking the testimony of witnesses within the jurisdiction, to be read in cases in equity in this district, is either by examination in open court or upon a commission with written interrogatories annexed, unless they be dispensed with by the parties. But it is competent to the parties to dispense with a commission; and if such agreement is in writing, and made before the master or commissioner, it cannot be withdrawn after the testimony is taken in pursuance of it.

In the case of *Sickles vs. The Gloucester Company*, in the Eastern District of Pennsylvania, *Legal Intelligencer*, (to be reported in 3 Wallace, Jr., Reports,) a rule for a commission had been taken by the defendant, and the counsel of the other side having filed the complainant's affidavit that the evidence, if taken before a commissioner upon interrogatories and cross-interrogatories, would operate unjustly and prejudicially to his interests, obtained a special order that he might have power to cross-examine the witnesses *ore tenus*; and that the testimony so taken shall have the same effect as if taken under rule 67. A motion to suppress the depositions taken in pursuance of the order was denied by the Court. The Court considered that the secret or private examination of witnesses in courts of equity has been repudiated by statute, and never has been a fundamental principle in their administration in the courts of the United States; and that the rule 67 does not annul the act of Congress, or the policy established by it. That was a patent case, and came peculiarly within the duty of the Court to have the examination of the witnesses with the models before them.

The practice to be observed in this district is, to take the testimony of witnesses within the jurisdiction in open court, or upon commission with interrogatories annexed, unless dispensed with, when counsel examine the witnesses *ore tenus* before the commis-

sioner, or by consent, by depositions waiving commission and written interrogatories. In this district, where there is no State law to give effect to the act of April, 1802, one party cannot require the opposite party to attend before a commissioner or master to take the depositions of witnesses within the jurisdiction, to be read at the final hearing of a cause in equity, except in cases specially provided for in the act of September, 1789. The depositions will be ordered stricken from the files.

In the Supreme Court of Pennsylvania.

GUTHRIE'S APPEAL.¹

1. The words of a will were, "I give and bequeath to my daughter, Elizabeth Bones, the use and life estate in her own proper person, (but without power to convey the same to any other person for any period or term,) all my messuage, tenement, etc., and at the decease of my said daughter, Elizabeth, the said lot or tract of land I hereby bequeath to such of her children or their heirs as may survive her, as tenants in common; that is, the child or children of any deceased child of hers shall hold the same interest and right that the deceased parent would have held if living." *Held*, that under the terms of the will, Elizabeth Bones took only an estate for life.
2. The cases of *M'Kee vs. M'Kinley*, 9 Casey, 89; *Williams vs. Leech*, 4 Casey, 89; and *Naglee's Appeal*, 9 Casey, 89, questioned.

Appeal from the Orphans' Court of Chester county.

The opinion of the Court was delivered by

STRONG, J.—The words of the will of Robert Harris, out of which arises the controversy in this case, are as follows:—"I give and bequeath to my daughter, Elizabeth, wife of James Bones, the

¹ We have been furnished by the counsel for the plaintiff, in the case of *M'Kee vs. M'Kinley*, with a paper book of the argument in that case, from which we gather some material facts which do not appear in the report in 9 Casey, 92.

From the paper book in *M'Kee vs. M'Kinley*, it appears that at the date of the testator's will, 26th January, 1846, the first taker, Mrs. M'Kee, the plaintiff, had not any child or issue born, nor had she any child or issue until nearly five months after testator's death. There were, therefore, no children or issue of plaintiff *in esse*, either at the date of the will, or when it went into operation, a feature in the case which does not appear in the report in 9 Casey.